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SMITH & NEPHEW, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHERYL DAILEY and RICHARD
DAILEY,

Plaintiffs,

v.

SMITH & NEPHEW, INC. and DOES 1
through 20, inclusive,

Defendants.

Case No. 09-CV-1234 JLS RBB

**DEFENDANT'S EX PARTE
APPLICATION FOR ORDER
REGARDING OCTOBER 9, 2009
SETTLEMENT CONFERENCE**

Judge: Ruben B. Brooks
Courtroom: 1185

INTRODUCTION

Pursuant to Civ. L.R. 83.3(h), Defendant SMITH & NEPHEW, INC. respectfully applies ex parte for an order to convert the Settlement Conference (the "Conference") scheduled for October 9, 2009 at 10:00 a.m. to a telephone conference to permit the attorneys and the Court to schedule a settlement conference for the reasons set forth below. In the alternative, Smith & Nephew requests permission to make its appearance at the settlement conference through outside counsel only.

At the July 6, 2009 Early Neutral Evaluation ("July 6 ENE"), the Parties and this Court anticipated that October 9 would work for a settlement conference because it was then believed medical records would be available for expert analysis. Despite Smith & Nephew's diligence, the

1 records are not available. Moreover, soon after the July 6, ENE, it was discussed that some
 2 adjustment to the schedule would need to be made because the person who best fits the Court's
 3 directive for a person with settlement authority¹, Ms. Jean Mercer, was scheduled to be out of the
 4 country for the month of October. The Parties have discussed multiple proposals to resolve this
 5 issue, but have been unable to find a solution.

6 At this late date, given that an agreement has not been reached, and that outside counsel
 7 for Smith & Nephew, Ms. Michelle A. Childers, will be out of the country from September 21
 8 through October 5, Smith & Nephew submits this application before reaching agreement. In any
 9 event, Court approval for any proposed relief would be required.²

10 BACKGROUND

11 By way of brief history, after the July 6 ENE, Smith & Nephew informed Plaintiffs that its
 12 person with settlement authority, Ms. Jean Mercer, was scheduled to be out of the country for the
 13 month of October, including October 9. Meanwhile, Plaintiff Cheryl Dailey's signed
 14 authorizations to release medical records were provided a month later than initially promised, and
 15 that meant it would take longer to collect medical records. Later, Smith & Nephew identified
 16 custodians of medical records with key documents that were not ordered initially because they
 17 were unknown by Plaintiffs.

18 From the start, the Parties attempted to agree on a joint proposal to the Court. The Parties
 19 originally agreed to jointly request a continuance of the settlement conference on the grounds
 20 that: (1) the person who best fits the Court's directive for person with settlement authority was
 21 scheduled to be out of the country and (2) Smith & Nephew could not adequately prepare for the

22 ¹ The July 7, 2009 Order requires that Smith & Nephew, Inc. bring a non-lawyer representative with complete
 23 authority to enter into a binding settlement. The individual from Smith & Nephew, Inc. who best fits the spirit of this
 24 description, Ms. Jean Mercer, is a lawyer. Smith & Nephew requests clarification that the representative not be a
 lawyer. See discussion in *Procedural History* section.

25 ² Counsel for Defendant contacted the Court on September 16, 2009 for guidance regarding the matters involving the
 26 October 9 Conference as discussed in this Application. It is Defendant's understanding that an Ex Parte Application,
 27 without a hearing, would be the Court's preferred manner for addressing such matters. On September 16, counsel for
 Defendant provided the requisite notice, as set forth in Civ. L.R. 83.3(h)(2), to Plaintiffs' counsel. See *Decl. of*
Michelle A. Childers In Support of Defendant's Ex Parte Application, ¶ 2.

1 conference without medical records and adequate time for expert evaluation. However, Plaintiffs
2 later withdrew their agreement.

3 The Parties then worked towards a solution to accommodate Plaintiffs' desire to move
4 forward on October 9. To partially resolve the issue related to the required attendance of a
5 company representative with settlement authority, the Parties planned to propose to the Court that
6 Smith & Nephew need not present a company representative on October 9 and instead, propose
7 another appropriate person to attend in Ms. Mercer's place. Plaintiffs also then recognized that
8 due to limited medical records, Smith & Nephew would not be prepared to discuss her entire
9 claim, if any, beyond pre-tibial swelling. Smith & Nephew understood that Plaintiffs agreed to
10 jointly request that the Court limit the scope of the discussion to Plaintiff Cheryl Dailey's pre-
11 tibial swelling. Smith & Nephew requested that Plaintiffs lower their previous demand before the
12 settlement conference. Plaintiffs agreed to make a demand, but never made a demand.

13 On September 15, 2009, after reviewing a proposed joint ex parte application outlining the
14 second solution, Plaintiffs stated that they had further evaluated this case and wanted to *demand*
15 damages beyond pre-tibial swelling. Smith & Nephew reiterated that it could not evaluate claims
16 for such damages without medical records and expert evaluation. Plaintiffs proposed that Smith
17 & Nephew attend unprepared, without a person with settlement authority, and that the Parties
18 make such a joint request. Smith & Nephew took the position that such an arrangement was
19 unproductive, and the Parties should continue the settlement conference until it has had time to
20 evaluate the case.

21 At this late date, and given the need to resolve this with the Court, Smith & Nephew
22 submits this ex parte application. It has requested another date its representative, Ms. Mercer,
23 could travel from Tennessee and will have available dates by October 9. Smith & Nephew is
24 willing to attend on October 9, but for reasons beyond its control cannot be prepared to fully
25 discuss the claim, and its person with settlement authority will be out of the country.

26 PROCEDURAL HISTORY

27 On April 28, 2009, Plaintiffs filed a complaint for damages entitled *Cheryl Dailey, et al. v.*
28 *Smith & Nephew, Inc. and Does 1-20, inclusive*, Case Number 37-2009-00054339-CU-PL-NC in

1 the Superior Court for the County of San Diego (Vista). Plaintiff Cheryl Dailey seeks damages
2 for injuries allegedly caused by Defendant's surgical screw, described by them as the Calaxo
3 Osteoconductive Interference Screw. (Complaint ¶¶ 10, 26-28).

4 This action was removed to this Court on June 5, 2009. Upon removal, Magistrate Judge
5 Ruben B. Brooks issued a Notice and Order setting an Early Neutral Evaluation for July 6, 2009
6 and later issued an order requiring attendance of counsel only. On July 7, 2009, following the
7 conference, the Court entered an order setting a further settlement conference on October 9, 2009
8 at 10:00 a.m. (hereinafter, "July 7 Order"). The July 7 Order required that "[a]ll parties, claims
9 adjusters for insured Defendants and non-lawyer representatives with complete authority to enter
10 into a binding settlement . . . must be present and legally and factually prepared to discuss and
11 resolve the case . . . at all settlement conferences."

12 Since the July 6 ENE, Smith & Nephew served subpoenas to obtain medical records upon
13 receipt of authorizations and identification of providers from Plaintiffs. However, Plaintiffs did
14 not provide authorizations until August 4, 2009, long after the date anticipated at the July 6 ENE.
15 Immediately after receiving the signed authorizations, on August 6, Defendant subpoenaed
16 records of the identified providers on a "rush" basis. Later, Smith & Nephew identified
17 custodians of medical records with key documents that were not ordered initially, because those
18 custodians were unknown by Plaintiffs. Moreover, the collection of records from third parties
19 includes diagnostics, which are taking additional time to obtain. Once obtained, they must be
20 analyzed by experts. To date, Defendant has subpoenaed records from approximately twenty
21 providers and has received records from about nine. Thus, a complete diagnostics and expert
22 review will not be completed by October 9. A complete medical records analysis is not necessary
23 to evaluate claims limited to pre-tibial swelling, but it would be necessary to evaluate the claims
24 Plaintiffs resurrected on September 15. Other than Plaintiff's pre-tibial swelling, Plaintiff's
25 claims are unique to her situation and require expert evaluation. They do not appear related to the
26 Calaxo screw.

27 Per the Court's July 7 Order, a non-lawyer representative whose authority is required to
28 negotiate and enter into a binding settlement is required to attend the Conference. Smith &

1 Nephew believes that the representative who best fits the spirit of this order is a lawyer, Ms. Jean
2 Mercer. No single person at Smith & Nephew has complete authority over large monetary outlay,
3 and the process of obtaining authority relies heavily on lawyers. For lawsuits of this type, Ms.
4 Mercer, in-house counsel for Smith & Nephew, Inc., would typically be given adequate authority
5 to resolve the case. Therefore, the participation of other non-lawyers from Smith & Nephew, Inc.
6 would not facilitate the settlement of this case. Plaintiffs, through their counsel, agree. However,
7 Ms. Mercer will be out of the country for the month of October, and therefore unavailable to
8 attend the Conference. Moreover, as was told to Plaintiffs in an effort to gain cooperation for a
9 continuance of the Conference early in this case, Ms. Mercer's schedule has since become full in
10 upcoming dates. Therefore, rather than continue the Conference and further delay the
11 development of this case, Smith & Nephew presents the possibility that the Court permit the
12 appearance at the Conference through outside counsel, Ms. Childers, only, or in the alternative,
13 permit the attendance of Ms. Mercer, as well as outside counsel, at a later settlement conference
14 at a time when Defendant's experts have been able to review all relevant medical records.

15 FACTUAL BACKGROUND

16 Based entirely on the allegations in the Complaint and records available to date, Plaintiff
17 Cheryl Dailey underwent surgery to repair her left ACL on January 19, 2007. Dr. Brad Cohen at
18 Pomerado Hospital in Poway, California, performed the surgery using an allograft (*donor graft*
19 *tissue*). A Calaxo screw was used to secure the tibial end of the allograft. A different type of
20 product was used to secure the femoral end of the allograft. In January 2007, Plaintiff began
21 physical therapy. In February, Plaintiff visited her chiropractor, Dr. Peter Whitely, and Dr.
22 Cohen, who placed her on an antibiotic for signs of infection and cellulitis. Plaintiff visited Dr.
23 Cohen on May 10, 2007 because she was experiencing a "tweaking feeling in the knee" and
24 having trouble performing lunges. The examination revealed tenderness at the distal end of the
25 tibial tunnel where the CALAXO screw was placed. On August 9, 2007, Plaintiff visited Dr.
26 Cohen who noted a prominent tibial screw status post ACL reconstruction. Dr. Cohen performed
27 a physical exam of Plaintiff's knee that identified no problems with graft stability (plaintiff's
28 "Lachman was solid and negative pivot shift"). On August 14, Dr. Cohen removed the CALAXO

1 screw. Plaintiff had developed a bump over the distal end of the tibial tunnel where the
2 CALAXO screw was located. A surgical pathology report by Dr. Jerry Kolins on the same day
3 revealed mild chronic inflammation and focal calcifications. Reports on August 21 and August
4 27 refer to a small amount of drainage from the incision after suture removal. Dr. Cohen
5 prescribed an antibiotic until the drainage stopped. On September 27, 2007, Plaintiff reported
6 continued drainage and was continued on antibiotics.

7 On February 25, 2008, Dr. Cohen recommended Plaintiff seek the opinion of another
8 orthopedic surgeon, Dr. William Schobert. On March 26, 2008, Plaintiff consulted with Dr.
9 Schobert who recommended bone grafting Plaintiff's tibial tunnel because he believed that
10 Plaintiff was at risk for re-tearing her allograft and loss of fixation on the tibia. Dr. Schobert also
11 recommended that she be appropriately treated for patellofemoral disease as she was noted to
12 have degenerative patellofemoral chondromalacia. On July 30, Plaintiff underwent a left knee
13 arthroscopic surgery for debridement and bone grafting of the tibial tunnel.

14 **RELIEF REQUESTED**

15 Smith & Nephew is willing to present to the Court as early as possible, but it cannot be
16 prepared to evaluate this case without medical records and individual expert analysis. Counsel
17 for Plaintiffs will no longer agree to narrow the subject matter of the Conference to issues
18 pertaining to Plaintiff Cheryl Dailey's pre-tibial swelling. It is Plaintiffs' delay that has
19 forestalled Smith & Nephew's complete evaluation of this case. Accordingly, it would be
20 unproductive to have Smith & Nephew attend a settlement conference at this time, particularly to
21 discuss issues beyond the pre-tibial swelling, when it has had no opportunity to obtain
22 independent expert evaluation.

23 **CONCLUSION**

24 For the reasons above, based on the information available to evaluate this case at this time,
25 and based on the unavailability of the Smith & Nephew's in-house representative, Smith &
26 Nephew moves this Court to grant its application for an order converting the October 9
27 Settlement Conference into a telephonic scheduling conference. In the alternative, Defendant
28

1 moves this Court for an order excusing Smith & Nephew's representative from attendance at the
2 conference.

3 Dated: September 16, 2009

DRINKER BIDDLE & REATH LLP

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5 By: 
6 Michelle A. Childers

7 Attorneys for Defendant
8 SMITH & NEPHEW, INC.
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